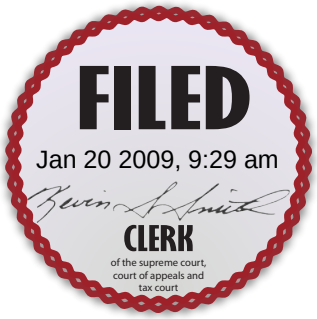

ATTORNEY FOR APPELLANT:

MICHELLE F. KRAUS
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

SHELLEY JOHNSON
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CARTRELL HARRIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0807-CR-358
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0707-FC-179

January 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Cartrell Harris appeals his conviction for Burglary,[1] a class C felony, challenging the sufficiency of the evidence. Specifically, Harris argues that the State failed to prove that his entry into a residence constituted a "breaking and entering" within the meaning of the burglary statute. Appellant's Br. p. 6. Harris also argues that his six-year sentence must be set aside because the trial court did not identify or give adequate weight to various mitigating factors that were allegedly apparent in the record. Finally, Harris argues that the sentence was inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On approximately July 20, 2007, a contractor secured the door locks on a vacant house on Anthony Boulevard in Fort Wayne. Angela Grable, a real estate broker, was attempting to sell the residence for the bank that owned it.

On July 22, 2007, Hector Nava, a neighbor in the area, observed Harris approach the rear of the house with a backpack and enter through the back door. Thereafter, Nava called the police. When the officers arrived, they noticed that the rear door had either been kicked in or pried open. While searching the house, one of the officers entered the basement and noticed someone holding a door upright "with [his] fingertips around it." Tr. p. 97. After identifying Harris as the individual who was holding the door, the officers arrested and handcuffed him. The police officers then noticed a black bag containing tools and copper

[1] Ind. Code § 35-43-2-1.

tubing sitting on the floor near Harris. The officers also observed that copper piping was missing from the basement ceiling. Harris admitted to the officers that the pipes came from the house and that the tools and the bag were his.

As a result of the incident, Harris was charged with burglary, a class C felony. Following a jury trial that commenced on November 20, 2008, Harris was found guilty as charged. At the subsequent sentencing, Harris argued that his mental illness, including alcohol dependence and schizophrenia, his graduation from high school and attendance at college, and the time that he served in the United States Air Force (Air Force), should be considered significant mitigating circumstances. Although the trial court determined that Harris's "mental health issues [were] mitigators," appellant's app. p. 114, it found that Harris's criminal history was a significant aggravating circumstance. Specifically, the trial court commented that Harris's history was "substantial and it does date back to 1977, but it continues on pretty regularly to date, including a felony in 2004." Id. The trial court then sentenced Harris to six years of incarceration at the Indiana Department of Correction (DOC). Harris now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

In addressing Harris's claim that the State failed to present sufficient evidence establishing that he broke and entered the residence, we initially observe that we neither reweigh the evidence nor judge the credibility of the witnesses. Gentry v. State, 835 N.E.2d 569, 572 (Ind. Ct. App. 2005). We only consider the evidence most favorable to the verdict

and the reasonable inferences that can be drawn therefrom. Id. Where there is substantial evidence of probative value to support the verdict, it will not be disturbed. Id. The weight and credit afforded a witness's testimony and the resolution of conflicts between their testimony and the inconsistencies within their own testimony is exclusively the function of the fact finder and one with which this court will not interfere. Ryle v. State, 549 N.E.2d 81, 83 (Ind. Ct. App. 1990).

Indiana Code section 35-43-2-1 provides that "[a] person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony." Breaking and entering is proved by showing even the slightest force was used to gain unauthorized entry. Opening an unlocked door, raising an unlocked window or pushing a door which is slightly ajar constitutes a breaking. Utley v. State, 589 N.E.2d 232, 241 (Ind. 1992). Moreover, circumstantial evidence alone is sufficient to sustain a conviction for burglary. Taylor v. State, 514 N.E.2d 290, 291 (Ind. 1987).

In this case, the evidence established that Harris was discovered with stolen property in the basement of the residence where the back door had been kicked in or pried open. Moreover, Nava testified that he observed Harris open the door and enter the house. Tr. p. 59, 60-61. Harris had copper tubing in his bag, which he admitted came from the house. Id. at 148. This was sufficient evidence to support Harris's conviction for burglary. See Johnson v. State, 512 N.E.2d 1090, 1091-92 (Ind. 1987) (upholding the defendant's burglary conviction where there was evidence of a break-in and the defendant was at the scene and in possession of stolen property).

II. Sentencing

A. Mitigating Circumstances

Harris next contends that he was improperly sentenced. Specifically, Harris argues that the trial court failed to identify his service in the Air Force as a mitigating factor and did not afford sufficient mitigating weight to his high school and college experiences and mental illness.

In resolving this issue, we initially observe that sentencing decisions are within the trial court's discretion and we will reverse only upon a showing of a manifest abuse of that discretion. In Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218 (2007), our Supreme Court held that trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. 868 N.E.2d at 490. If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. Id. A trial court may abuse its discretion by entering a sentencing statement that includes reasons for imposing a sentence not supported by the record, omits reasons clearly supported by the record, or includes reasons that are improper as a matter of law. Id. at 490-91.

We also note that it is within the trial court's discretion to determine the existence of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App.

2000). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Anglemyer, 868 N.E.2d at 493. In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006).

In Hayden v. State, 830 N.E.2d 923, 930 (Ind. Ct. App. 2005), this court observed that a defendant's service in the military deserves some mitigating weight. However, a sentencing court need not agree with the defendant as to the weight or value to be given to mitigating factors. Sipple v. State, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003). As noted above, the trial court identified Harris's criminal history as a significant aggravating circumstance. Tr. p. 114. As the trial court pointed out at the sentencing hearing, Harris's criminal history is substantial and dates back to 1977. Harris's criminal activity has continued "regularly to date," and it includes a felony conviction in 2004. Appellant's App. p. 114. Indeed, the pre-sentence investigation report establishes that Harris has accumulated three prior burglary convictions. Appellee's App. p. 3. He was also convicted of sexual battery in 2004, and has accumulated several convictions for misdemeanor offenses including larceny and patronizing a prostitute. Id. at 3-4. When considering Harris's criminal history, any mitigating weight that Harris's military service might warrant is slight in comparison to

this aggravating factor. Indeed, the trial court could certainly afford significant aggravating weight to Harris's criminal history because many of those offenses were similar in nature to the instant offense. See Wooley v. State, 716 N.E.2d 919, 929 n.4 (Ind. 1999) (observing that the significance of a defendant's criminal history varies based on the gravity and nature and number of proper offenses as they relate to the current offense). Moreover, Harris was on parole when he committed the instant offense. In light of these circumstances, we cannot say that the trial court abused its discretion in sentencing Harris when it did not identify Harris's service in the Air Force as a mitigating circumstance.

Similarly, although Harris maintains that the trial court did not assign sufficient mitigating weight to his graduation from high school, attendance at college, and his mental illness, the weight that a trial court decides to give a mitigator is not reviewable on appeal. Anglemyer, 868 N.E.2d at 491. Thus, Harris's claim that the trial court abused its discretion in failing to identify and properly weigh his proffered mitigating factors fails.

B. Inappropriate Sentence

Harris next claims that the six-year sentence is inappropriate in light of the nature of the offense and his character pursuant to Indiana Appellate Rule 7(B). In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

> Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence

> as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .
>
> The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived "correct" result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

In this case, the trial court enhanced the four-year advisory sentence for class C felony burglary[2] by two years when sentencing Harris. In considering the nature of the offense, the record shows that Harris damaged the door when he broke into the residence. He then stripped the basement ceiling of copper tubing, which resulted in damage to the house. Tr. p. 151.

As for Harris's character, the record shows that his criminal history is significant. As noted above, he has amassed three prior convictions for burglary and one felony conviction for sexual battery. Additionally, Harris was on parole when he committed the present offense. Appellee's App. p. 3-4. Harris also admitted that he began abusing alcohol and

[2] The advisory sentence for a class C felony is four years, with a sentencing range between two and eight years. I.C. § 35-50-2-6.

drugs when he was nineteen years old. Id. at 6. Even though Harris stated that he received treatment for his substance abuse in 2005, he has continued to commit criminal offenses.

In light of Harris's ongoing criminal activity, his pattern of committing similar offenses, and the fact that he was on parole when he committed the instant offense, we cannot say that the six-year sentence is inappropriate when considering the nature of the offense and Harris's character.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.